No. 57

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

GAETANO LUCCHESE, ALSO KNOWN AS THOMAS LUCKESE, ALSO KNOWN AS THOMAS LUCASE, ALSO KNOWN AS THOMAS ARRA, ALSO KNOWN AS THOMAS LUCHESE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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As respondent views this case, the government erred in taking its appeal to the Court of Appeals in an attempt to correct the District Court's error in refusing to add the words "without prejudice" to the order dismissing the denaturalization complaint. He argues that only this Court has the power to determine whether the District Court complied with the Court's mandate in *Lucchese* v. *United States*, 356

U.S. 256, and that the Court of Appeals had no jurisdiction over the subject matter of the government's appeal. Pointing out that he moved to dismiss the appeal on this basis, respondent reads agreement with his contention into the order of the Court of Appeals, and concludes that this Court should therefore affirm the action by the lower court as having been proper when taken.

The Court of Appeals did not hold that it had no jurisdiction to entertain the government's appeal. It is true that the order dismissing the appeal recites that respondent moved to dismiss the appeal for lack of jurisdiction and that the motion "hereby is granted" (R. 42). However, the opinion of the Court of Appeals [1] can be read only as deciding that the District Court acted correctly, not that the Court of Appeals had no authority to pass on the soundness of that action. "Upon clear authority and in reason," the appellate court said (R. 41),

> there was no basis for Judge Inch to take action other than he did, namely, to comply with the clear command of the Supreme Court, without attempted embellishment. We have no occasion now to pass on the effect of that command upon possible later litigation.

There is nothing in this that suggests a holding that the Court of Appeals had no power to consider the merits of the trial court's action. To dismiss this

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[1] The opinion is to be consulted in determining the reason for the entry of an order. *In re Sanford Fork and Tool Company*, 160 U.S. 247, 256; *West* v. *Brashear*, 39 U.S. (14 Pet.) 51, 54-55; *Gaines* v. *Rugg*, 148 U.S. 228, 237-239.

language as "mere *obiter dicta*," as does respondent (Br., p. 6) is to characterize the entire opinion by the Court of Appeals as *obiter*, for we have set it forth in its entirety, except for an opening sentence noting the action taken.

The merits of respondent's contention, that an appeal did not lie to the Court of Appeals, depend on the merits of the main issue in the case—whether the District Court had power to do more than mechanically copy this Court's mandate into an order of dismissal. There is authority for the proposition that, where the trial court to which the mandate of this Court is directed refuses to obey or misconstrues that mandate, only this Court has "jurisdiction" to correct the error. See *Ex parte First National Bank of Chicago*, 207 U.S. 61, 66; *Ohio Oil Company* v. *Thompson*, 120 F. 2d 831, 835 (C.A. 8), certiorari denied, 314 U.S. 658; *Mercoid Corporation* v. *Minneapolis-Honeywell Regulator Company*, 142 F. 2d 549, 550 (C.A. 7); *Ringhiser* v. *Chesapeake and Ohio Railway Company*, 264 F. 2d 62, 63 (C.A. 6).[2] It is equally well established that the decision of the District Court on remand as to new issues, or issues left open by this Court's mandate, can be reviewed only by a new appeal to the proper appellate court

[2] We do not believe that *Baltimore and Ohio Railroad Company, et al.* v. *United States*, 279 U.S. 781, stands for the proposition that the Court of Appeals is to be by-passed. In that case the appeal was properly taken directly to this Court under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, as an appeal from a final decree by a three-judge District Court setting aside an order of the Interstate Commerce Commission.

—in this case, the Court of Appeals for the Second Circuit. *Mason* v. *Pewabic Mining Company*, 153 U.S. 361, 366; *Ex parte The Union Steamboat Company*, 178 U.S. 317, 319-320; *Christoffel* v. *United States*, 214 F. 2d 265, 266-267 (C.A. D.C.), certiorari denied, 348 U.S. 850; *Illinois Bell Telephone Company* v. *Slattery, et al*, 98 F. 2d 930, 932-934 (C.A. 7); see *Sprague* v. *Ticonic Bank*, 307 U.S. 161, 162-164. The question of authority to review the action taken by the District Court depends, therefore, upon whether this Court's mandate left open the question of whether the words "without prejudice" could (as the government argued) permissibly be inserted in the order of dismissal. If they could, then authority to review the erroneous refusal to give the government the relief it requested resided in the Court of Appeals. In short, the question of which court has power to review, raised by respondent, depends upon this Court's view of the merits of this case, *i.e.*, whether it was open to the District Court (under this Court's mandate) to order a dismissal without prejudice.

In any event, we do not accept respondent's suggestion that, if the District Court had no power to do more than copy this Court's mandate *in haec verbis* into an order of dismissal, the government's only remedy was to seek rehearing of this Court's decision under Rule 58 of the Court's Rules (Br., p. 6). The authority flowing from 28 U.S.C. 1651 to issue extraordinary writs persists even though the term of court in which the mandate was issued has

expired. *United States* v. *District Court*, 334 U.S. 258, 262-265. Hence, the scope of the mandate can be clarified now, in the present proceeding.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 57.—October Term, 1960.

United States, Petitioner, v. Gaetano Lucchese, etc.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February 20, 1961.]

Mr. Justice Brennan delivered the opinion of the Court.

This denaturalization proceeding was brought in the District Court for the Eastern District of New York under § 338 (a) of the Nationality Act of 1940. 8 U. S. C. § 738. The "good cause" affidavit was not filed with the complaint. The District Court dismissed the complaint following our decision in *United States* v. *Zucca*, 351 U. S. 91, "without prejudice to the government's right to institute a proceeding to denaturalize the defendant upon the filing of the required affidavit." 149 F. Supp. 952. The Court of Appeals for the Second Circuit reversed, holding that the dismissal motion should have been denied. 247 F. 2d 123. We reversed and ordered the case "remanded to the District Court with directions to dismiss" the complaint. 356 U. S. 256. The District Court on the remand declined to order a dismissal "without prejudice" and instead entered an order which did not specify whether the dismissal was with or without prejudice. The Court of Appeals for the Second Circuit dismissed the Government's appeal in an unreported opinion which stated that "there was no basis for [the district judge] to take action other than he did, namely, to comply with the clear command of the Supreme Court, without attempted embellishment. We have no occasion now to pass on the effect of that command upon possible later litigation."

The Government filed its petition for certiorari only to assure its right to proceed against the respondent in a new proceeding in the event that we should rule in *Costello* v. *United States, ante*, p. —, that the order entered by the District Court for the Southern District of New York in that case precluded the institution of the second denaturalization action against Costello. Our decision today in *Costello* establishes that such a form of dismissal does not bar a subsequent proceeding against the respondent. The writ is therefore

Dismissed.

MR. JUSTICE HARLAN took no part in the consideration or decision of this case.